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No. 86-602

In The
Supreme Court of the United States
October Term, 1986

PEARSON TRUCKING AND RIGGING, INC.,
Petitioner,

v.

JOSEPH HICKS, dba HICKS ENGINEERING CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition is jurisdictionally out of time.

2. Whether an interstate carrier may be estopped from asserting the nine-month written claim requirement of a bill of lading as a condition precedent to the payment of a shipper's damage claim when by the carrier's own misconduct the shipper is misled into not filing a written claim.

3. Whether certiorari should be granted to review the sufficiency of the evidence establishing detrimental reliance for estoppel.

4. Whether certiorari should be granted to review the sufficiency of the evidence establishing the foreseeability of special damages.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent hereby submits this brief in opposition to the Petition for a Writ of Certiorari.

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CITATIONS TO OPINIONS BELOW

1. *Hicks v. BHY Trucking,* 99 Nev. 519, 665 P.2d 253 (1983).

2. *BHY Trucking v. Hicks,* 102 Nev. — (Adv.Opn. 75), 720 P.2d 1229 (1986).

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JURISDICTION

Respondent contends that this Petition is jurisdictionally out of time. The question of estoppel was expressly decided by the Nevada Supreme Court in *Hicks v. BHY Trucking,* 99 Nev. 519, 665 P.2d 253 (1983). While the case remained to be tried following that decision, the State court's position on the federal issue was conclusive. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

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STATEMENT OF THE CASE

While Petitioner's statement of the case outlines a small portion of the evidence presented at trial, there was substantially more testimony relating to the reasons why a timely written notice of claim was not filed. Upon delivery, Respondent HICKS promptly discovered the damage to his machinery and verbally complained to one of the truck drivers who "said not to worry about it, they would take care of it." [T: Vol. I, pp. 21-22, 28.] The nature of the damage and its cause (torn tarps) were expressly noted in writing on both freight billings at that time. When contacted by telephone, PEARSON TRUCKING AND RIGGING disclaimed any responsibility and referred HICKS to BHY TRUCKING [T: Vol. III, pp. 243-244]. Dick Culy, a representative of BHY, told HICKS, "there would be an adjuster to come and appraise the damage of these machines, and that they would take care of it. . . ." [T: Vol. III, p. 245, ll. 9-12]. When no adjuster appeared, HICKS was repeatedly assured over a lengthy period of time by Culy that the adjuster was coming [T: Vol. III, pp. 245-248]. When HICKS was unable to complete the blank claim form requesting the estimated costs of repair, he telephoned Culy again:

> "I told him I couldn't do it, because I wasn't a machinery rebuilder. I had no idea of the cost. And he said, 'Don't worry about it. The machinery adjuster will help you with that.' "

[T: Vol. III, p. 245, ll. 23-26]. When asked at trial why he did not promptly file the written claim form, HICKS replied:

> "I was waiting for the adjuster to come and fill in on the forms how much it was going to be to remachine the surfaces that were rusted."

[T: Vol. IV, p. 371, ll. 8-10.]

Similarly, there was substantially more testimony than suggested by Petitioner regarding the foreseeability of HICKS' consequential business losses. There was testimony and evidence that both carriers knew they were moving an operating machine shop business as opposed to merely some generic machinery. [T: Vol. II, p. 155; Vol. II, pp. 214-216; Vol. IV, pp. 408-410; Vol. VI, p. 661.] A PEARSON agent had also represented to HICKS that his company had experience in handling such important cargo. [T: Vol. II, p. 212.] Based upon this and other evidence at trial, HICKS contended that at the time the contract was made it was readily foreseeable that he would suffer business losses if the machinery was damaged. The factual questions generated by the arguably conflicting evidence were submitted to the jury and resolved against the carriers. [ROA: Vol. I, pp. 219-220.]

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ARGUMENT

I.

THE ISSUE OF ESTOPPEL OF AN INTERSTATE CARRIER ARISES ONLY UNDER THE MOST UNUSUAL FACTS, AND THOSE COURTS ACTUALLY PRESENTED WITH THE QUESTION HAVE REACHED TOTALLY UNIFORM CONCLUSIONS.

In its first opinion in this case, *Hicks v. BHY Trucking*, 99 Nev. 519, 665 P.2d 253 (1983) the Nevada Supreme Court held that an interstate carrier could be estopped under certain unusual circumstances from asserting the written claim requirement. In that opinion the Nevada court faced a question directly addressed by only a small number of cases. A review of the available authority demonstrates that the problem rarely arises factually and there is no conflict in the few decisions on point.

This Court has firmly established that waiver or estoppel to assert the terms of a bill of lading cannot be predicated upon the fact that the carrier failed to safely deliver the shipment as agreed in its contract, and the shipper therefore remains bound by the other terms of that contract under such circumstances. *Georgia, Florida & Alabama Railway Co. v. Blish Milling Co.*, 241 U.S. 190 (1915); *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209 (1931) (waiver or estoppel based upon the carrier's breach of contract would thwart the purpose of the Interstate Commerce Act to prevent preferences and discrimination in rates and service). This general rule is uncontroverted and regularly recited in many of the carrier case

In the *Martin* opinion, however, this Court expressly left open the question whether any other circumstances might justify use of the doctrine of estoppel. 283 U.S. at 222. Only in a small number of unusual cases have any courts found such special circumstances. The courts of this country have consistently demanded full compliance with the written claim requirement except in the rare instances where, after loss or damage to the shipment, the carrier acts in some additional manner to mislead the claimant and induce a failure to file a timely claim.

The few courts facing those extraordinary facts have uniformly and justly concluded that a carrier may not rely upon its own misconduct to avoid liability in such cases. *Lehigh Valley R. Co. v. State of Russia,* 21 F.2d 396 (2d Cir. 1927), *cert. denied,* 275 U.S. 571 (1927) (carrier erroneously advised claimant to file written notice in the wrong office); *Perini-North River Associates v. Chesapeake & Ohio Railway Co.,* 562 F.2d 269 (3d Cir. 1977) ("peculiar facts": carrier's clerk advised that claim was not needed and carrier deviated from standard procedures for notifying claimant of damages); *Union Carbide Corp. v. Consolidated Rail Corp.,* 517 F.Supp. 1094 (N.D. Ill. 1981) (carrier falsely advised shipper that shipment back enroute after derailment); *Peters v. United Van Lines, Inc.,* 82 Ill.App.3d 104, 402 N.E.2d 378 (1980) (carrier's driver induced acceptance of shipment by representation that location of missing goods was known and delivery was pending); *South Carolina Steel Corp. v. Southern Railway Co.,* 262 S. C. 543, 206 S.E.2d 828 (1974) (carrier erroneously advised claimant that exact amount of damages was required on claim form); *see, Miller v. Aaacon Auto Transport, Inc.,* 447 F.Supp. 1201 (S.D. Fla.

1978) (carrier misled shipper into believing that only information on her insurance coverage was required).

Each of these decisions reflects the view that the doctrine of estoppel can be used when it enhances the statutory purpose of the Carmack Amendment.[1] The test is whether permitting application of the doctrine to a given state of facts would open the door to a carrier discriminating among shippers contrary to law. *South Carolina Steel Corp. v. Southern Railway Co., supra,* 206 S.E.2d at 831. When a carrier misleads a shipper regarding the written claim procedures, these courts have unanimously agreed that estoppel is appropriate:

> "If the carrier be not estopped by its conduct in this case, it is readily apparent that a carrier could discriminate by giving correct information to one shipper as to proper procedure for timely filing of a claim, but give to a shipper, which it did not wish to pay, incorrect information thereabout misleading such shipper into failing to file a formal written complaint until it was too late."

Id. Each of these courts has implicitly recognized that the contrary view suggested by Petitioner would undermine the Carmack Amendment and open the door to potential abuse of the written claim restrictions.

While Petitioner perceives a conflict between the courts on the question, none of the decisions cited for the

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[1] This Court has held that a federal statute setting a time limitation upon exercise of a statutory right does not restrict the power of the federal courts to toll that statute of limitations under certain circumstances not inconsistent with the legislative purpose. *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 559 (1974).

opposing view involved misleading conduct by the carrier with respect to the claim procedures. While each of those decisions reiterated the general rule prohibiting waiver or estoppel based upon the carrier's primary breach of contract, none of those courts considered the question posed in the six unusual cases discussed above.

The decision of the Nevada Supreme Court in the first appeal in this case acknowledged that there was evidence suggesting the carriers induced the untimely claim by repeatedly promising HICKS the assistance of an adjuster to complete the written form. The court's application of estoppel conforms to the conclusions reached by each of the six courts considering analogous unusual circumstances. The problem is rare, the judicial decisions are uniform, and the results have justly enhanced the purpose of the Carmack Amendment. Petitioner has demonstrated no special and important reasons for the exercise of this Court's discretion to review on certiorari. Sup.Ct.R. 17.1.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE SUFFICIENCY OF THE EVIDENCE ESTABLISHING DETRIMENTAL RELIANCE FOR ESTOPPEL.

The law of estoppel in Nevada does not differ from the principles cited in the Petition. *See, Southern Nevada Memorial Hospital v. State, Department of Human Resources,* 101 Nev. 387, 705 P.2d 139 (1985); *Lubritz v. Circus Circus Hotels, Inc.,* 101 Nev. 109, 693 P.2d 1261 (1985). By selecting two statements out of context from a lengthy trial, Petitioner seeks a review of whether the element of detrimental reliance was provn in this case. As

summarized above, there was substantial evidence that HICKS postponed filing of his claim on the carrier's representations that assistance was coming. To the degree such testimony was conflicting, there was a question for the jury.

"Whether respondents . . . are estopped depends upon the facts. Granting of the writ [of certiorari] would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

III.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE SUFFICIENCY OF THE EVIDENCE ESTABLISHING THE FORESEEABILITY OF SPECIAL DAMAGES.

Relying upon a limited selection of favorable testimony, Petitioner also seeks review of the evidence that lost business damages were foreseeable and within the contemplation of the parties to the contract. As noted above, there was ample evidence tendered by HICKS that the carriers were fully aware of the essential nature of the shipment and the inevitable consequences to the HICKS business if damage occurred. Foreseeability of particular damages at the time of a contract is essentially a question of fact largely dependent upon the circumstances of each case. *Hycel, Inc. v. American Airlines, Inc.*, 328 F.Supp. 190, 194 (S.D. Tex. 1971); *Daniel v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086 (1982).

Petitioner neglects to mention that this case was also submitted to the jury, without objection by the carriers,

on a negligence theory [ROA: Vol. II, pp. 267-270] under which a wrongdoer is liable for all the natural and probable consequences of his negligent act. *Atchison, T. & S.F. Ry. Co. v. Jarboe Livestock Commission Co.*, 159 F.2d 527, 530 (10th Cir. 1947). Regardless of the legal approach, this Court has repeatedly held that a writ of certiorari will not be granted to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 521, 537 (1957) (Frankfurter, J., dissenting).

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CONCLUSION

Where, after loss or damage to a shipment, a carrier acts in some additional manner to mislead the shipper so as to induce a failure to file a timely written claim, the several courts facing the question have uniformly concluded that the carrier may not rely upon its own misconduct to avoid liability. The Petitioner's effort to bring this question before this Court by way of this Petition is untimely, for the Nevada Supreme Court conclusively set forth its position on this issue some three years ago. Lastly, the remaining questions presented by the Petitioner involve the review of evidence or the inference to be drawn from the evidence, an inappropriate undertaking for this Honorable Court.

For these reasons, a writ of certiorari is unwarranted and the Petition should be denied.

RESPECTFULLY SUBMITTED this 7 day of NOVEMBER, 1986.

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